No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOSEPH C. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,

Petitioners,

vs.

THOMAS A. FITZGERALD, Trustee in Bankruptcy,

Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY,
a partnership consisting of HORACE LEON MIDYETT
and RUEL FARRIES MAY, Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BENTLEY M. McMULLIN,
200 Dayton Street,
Denver 8, Colorado,
Attorney for Petitioners.

FEDELER PRINTING CO., 1834 BROADWAY, DENVER, COLORADO

INDEX

	Page
A. Citation to opinions below	1
B. Jurisdiction	2
C. Question presented for review	2
D. Statute involved	2
E. Statement of the case	2
F. Reasons relied upon for issuance of writ	4
1. Questions resulting from changes in the bankruptcy act need to be determined by this court	4
2. The question presented is important to the administration of the bankruptcy act	8
3. The Court of Appeals has decided a federal question in a way which is in conflict with an applicable decision of this court	9
4. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals in the same matter	12
5. Other miscellaneous considerations indicate that action by this court is desirable	13
G. Conclusion	13

APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Tenth Circuit . . . 14

Appendix B. 11 U. S. Code 104 . . . 17

TABLE OF CASES CITED

Cabaniss v. Benton, 336 U. S. 132; 93 L. Ed. 553 (1948) . . . 8

Conrad, Rabon and Lesser v. Pender, 289 U. S. 472; 77 L. Ed. 1327 (1933) . . . 9

INDEX (Continued)

	Page
In re Rothman, 85 F. (2d) 51 (CCA 2, 1936)	4, 12

TEXT BOOKS CITED

Collier on Bankruptcy, 13th Ed.	5
Collier on Bankruptcy, 14th Ed.	11
Sec. 62.14, pp. 1510-1537	11
Sec. 62.31, p. 1596	11
Sec. 64.102, p. 2070	11
Sec. 64.105, p. 2091	11
Gilbert's Collier on Bankruptcy, 2nd Ed.	5

STATUTES CITED

Bankruptcy Act of 1898	
Section 14	5
Section 64 (b) (3)	9, 12
11 United States Code	
Section 25 (a)	7, 8
Section 32 (a), (b), (c)	6, 7
Section 32 (d)	9
Section 72 (a) (7), (b)	7, 8
Section 75 (a) (9)	9
Section 102 (d)	3
Section 104 (a) (1)	2, 3, 8, 9, 10, 11
28 United States Code	
Section 1254 (1)	2
Section 1334	1
Chandler Act (Act of June 22, 1938; 52 Stat. 840)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,

Petitioners,

vs.

THOMAS J. FITZGERALD, Trustee in Bankruptcy,

Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY,
a partnership consisting of HORACE LEON MIDYETT and RUEL FARRIES MAY, Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled proceeding on October 21, 1961, and in which a petition for rehearing was denied on November 30, 1961.

A. CITATION TO OPINIONS BELOW.

The referee in bankruptcy did not render an opinion.

The United States District Court for the District of Colorado did not render an opinion.

The United States Court of Appeals for the Tenth Circuit rendered an opinion not yet reported, which is set forth as Appendix A, attached hereto.

B. JURISDICTION

The question presented arises under the laws of the United States relating to bankruptcy, and jurisdiction was conferred upon the United States District Court for the District of Colorado by 23 U. S. Code 1334.

Judgment was entered by the United States Court of Appeals for the Tenth Circuit on October 21, 1961 (R. 4). A petition for rehearing was denied on November 30, 1961 (R. 6).

Jurisdiction to review the judgment of the Court of Appeals is conferred on this court by 28 U.S. Code 1254 (1).

C. QUESTION PRESENTED FOR REVIEW

The question presented for review is whether attorneys for a bankrupt are entitled to compensation from the bankrupt estate for services which they have rendered to the bankrupt upon the hearing of objections to the bankrupt's discharge.

D. STATUTE INVOLVED

The statute involved is 11 U.S. Code 104 (a), which is set forth as Appendix B.

E. STATEMENT OF THE CASE

Midyett and May Construction Company, a partnership consisting of Horace Leon Midyett and Ruel Farries

Note: References to the typewritten record are indicated by the letter R. followed by the page number; references to the printed appendix record are indicated by the letters AR. followed by the page number.

May, engaged in the construction business at Denver, Colorado, was adjudged a bankrupt on March 14, 1967 (AR 3). Scheduled assets totalled $80,637.70, including $27,237.17 in cash in banks (AR 18).

Two creditors of the bankrupt, Fidelity and Deposit Company of Maryland, and Willard Nicoll, filed objections to the discharge of the Bankrupt (AR 4). A hearing upon the objections was had at which the two creditors and the bankrupt were all represented by counsel, the bankrupt being represented by petitioners (AR 11). A discharge was granted to Ruel Farris May (AR 10), and was denied to Horace Leon Midyett, and was also denied to the partnership (AR 11).

In accordance with 11 U.S.C. 104 (a) (3) the two objecting creditors filed claims against the estate for reimbursement for fees in the total sum of $2,100.00 paid to their attorneys for services in obtaining a refusal of the discharge (AR 7, 9).

In accordance with 11 U.S. Code 104 (a) (1) petitioners filed a claim for payment from the estate of the sum of $2,500.00 as their fee for the professional services rendered by them to the bankrupt in the entire bankruptcy proceeding, including the services rendered by them to the bankrupt upon the hearing of the objections to discharge (AR 3-6). Petitioners' claim was accompanied by the affidavit required by 11 U.S. Code 102 (d) (AR 6-7).

The claims of the two objecting creditors for reimbursement for services rendered by their attorneys in obtaining a refusal of the discharge were both allowed in the total amount claimed, namely, $2,100.00 (AR 10).

Petitioners' claim for services rendered to the bankrupt was allowed in the sum of $900.00 for services rendered prior to the hearing upon objections to discharge (AR 10). Petitioners' claim, so far as it sought compensation for services rendered to the bankrupt on objections to discharge, was denied (AR 10). The order of the referee

states that the order was made solely upon consideration of the facts stated in the petition for allowance (AR 10). No question as to the amount of the claim was raised, it being assumed that if the claim should be allowed in any amount, the amount claimed was reasonable.

The effect of the referee's order was to deny petitioners the sum of $1,000.00 claimed by them as compensation for services rendered to the bankrupt on objections to discharge.

Upon petition for review the referee's order was affirmed by the District Court (AR 18), and the judgment of the District Court was affirmed upon appeal (R. 4). This petition for a writ of certiorari is now filed.

F. REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. *Questions resulting from changes in the bankruptcy act need to be determined by this court.*

In the case of

In re Rothman, 85 F. 2d 51 (C.C.A. 2, 1936)

it was held that services rendered by an attorney for a bankrupt upon objections to discharge were not compensable from the bankrupt estate. The decision in the present case was based upon the *Rothman* case.

In the twenty-six years which have intervened since that case was decided this question, except in the present case, has apparently not been before the courts. In the meantime the statutory provisions which affect the right to such compensation have been radically changed. Two years after the decision in the *Rothman* case, the entire bankruptcy act was revised by the passage of the Chandler Act (Act of June 22, 1938; 52 Stat. 840). By that act, and by subsequent amendments, the statutory basis for the allowance of compensation to attorneys for the bankrupt for services rendered in connection with objections to dis-

charge has been entirely changed. These changes have completely invalidated the conclusion arrived at in the *Rothman* case. The reasoning of that case, applied to today's statute, requires the allowance of such compensation.

In the *Rothman* case the court denied compensation because, as it said,

> "The discharge proceedings remains a collateral issue, personal between bankrupt and creditors and unconnected with the administration of the estate" (85 F. 2d 53).

This statement was based on the provisions of Section 14 of the Bankruptcy Act of 1898, as then amended (Act of July 1, 1898, 30 Stat. 550; as amended by Act of Feb. 5, 1903, 32 Stat. 797; Act of June 25, 1910, 36 Stat. 839; and Act of May 27, 1926, 44 Stat. 663). The section, as it then existed, appears in Collier on Bankruptcy, 13th Ed., and in Gilbert's Collier on Bankruptcy, 2d Edition. At the time of the *Rothman* decision the section read as follows:

> "*Discharges, When Granted.* a. Any person may, after the expiration of one month and within twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; and if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.
>
> b. The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the bankrupt unless he has (1) committed an offense punishable by imprisonment as herein provided; etc. . . ."

Under this statute the proceedings for a discharge were initiated by a separate petition. This petition was not filed in the bankruptcy proceeding; it was filed with and addressed to the judge, and might be filed as long as eighteen months after adjudication, when the estate had perhaps been fully administered and all assets disposed of. The petition was heard, not by the referee, but by the judge, who was required to "investigate the merits of the application" and grant the discharge unless there had been a violation of the bankruptcy act. The discharge proceeding was, under this statute, indeed a collateral proceeding, as the court said in the *Bethman* opinion.

But the provisions of the law as it existed when the *Bethman* case was decided are no longer in effect. The former section, as later amended, now appears as 11 U. S. Code 32, and is as follows:

"Discharges, when granted.

"(a) The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided*, That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

"(b) After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made

in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

"(c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment, as provided under section 152 of Title 18; etc."

Under the act as it exists today the application for a discharge is not separate or distinct from the bankruptcy proceedings, nor is it collateral thereto. A separate petition need no longer be filed, except in the case of a corporation. The adjudication of an individual, without anything further, operates as his application for a discharge. This application is heard and disposed of, not by the judge in a separate and distinct proceeding, but by the referee as a part of the bankruptcy proceeding itself. This right to a discharge is determined upon notice given by the referee and while the estate is being administered. The factors which caused compensation to be denied in the *Rothman* case no longer exist.

In addition, the opinion in the *Rothman* case states that the services for which compensation may be allowed the attorney for a bankrupt include those services which are

"... rendered in and of the administration of the estate",

and services

"... which are reasonably necessary to enable the bankrupt to perform his duties under the act."

The act now *requires* the bankrupt to attend the hearing upon objections to his discharge (11 U.S. Code 25 (a); see also 11 U.S. Code 72 (a) (7) (b)). Upon attendance at the hearing the bankrupt is entitled to the assistance of counsel, and his attorney, upon such hearing, is rendering "aid in the administration of the estate" and doing what is

"reasonably necessary to enable the bankrupt to perform his duties under the act". Thus, according to the *Bothwell* case, entitles the attorney to compensation from the estate.

The Court of Appeals made no attempt to clarify or restate the law in the light of the changes that have been made. However, the changes are determinal they will continue to cause doubt and further litigation until their effect has been definitely determined and stated by this court.

2. The question presented is important to the administration of the bankruptcy act.

This court has heretofore granted certiorari upon the ground that the question presented was important to the administration of the bankruptcy act.

Collins v. Benton, 336 U.S. 132; 93 L. Ed. 559 (1948).

Nothing is more important to the administration of the bankruptcy act than proper legal assistance to the bankrupt. Such assistance cannot be obtained without compensating the bankrupt's counsel. The act, by providing that the debts to have priority shall include

> "one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow" 11 U.S. Code 104 (a) (1).

recognized the necessity for such compensation.

There is nothing in the language just quoted which indicates that the payment shall be for a part only of the services which are performed. On the contrary, the language indicates that payment shall be made for *all* professional services performed for the bankrupt in the bankruptcy proceedings. Certainly compensation must be made for all services the performance of which is made necessary by the terms of the bankruptcy act itself.

As above stated, the bankruptcy act now *requires* the bankrupt to attend the hearing upon objections to his discharge (11 U.S. Code 25 (a)). The act now *requires* the trustee to examine the bankrupt upon the hearing of the objections, and so again *requires* the bankrupt to be present to be examined (11 U.S. Code 75 (a) (7) (b)). The bankrupt is entitled to the assistance of counsel when attending the hearing and when being examined by the trustee. In addition, the trustee is now authorized to oppose discharges (11 U.S. Code 75 (a) (9)), and so is the United States Attorney or special counsel appointed by the Attorney General (11 U.S. Code 52 (d)). In resisting such objections the bankrupt is entitled to counsel.

The services of an attorney for a bankrupt performed in connection with objections to a discharge are services which are performed to assist the bankrupt in complying with the provisions of the bankruptcy act. Like all other services similarly performed they are compensable. Work is usually better done when fair and reasonable compensation is assured. A decision by this court that such services are compensable will secure better services and better administration of the bankruptcy act.

3. *The Court of Appeals has decided a federal question in a way which is in conflict with an applicable decision of this court.*

In the case of

Conrad, Rabin and Lessers v. Pardee, 289 U.S. 472, 476; 77 L.Ed. 1327 (1933)

this court, speaking of the right to compensation for legal services rendered to the bankrupt, and referring to Section 64 (a) (5) of the Bankruptcy Act of 1898, as then amended, now appearing as 11 U.S. Code 104 (a) (5), and being the statute involved in the present case, said that

"The services within the latter provision are those rendered in and of the administration of the estate and the carrying out of the provisions of the Act." (Our underscoring).

In the present case the Court of Appeals, speaking of the provisions of the same statute, says that

> "The statute expressly authorizes payment of actual and necessary costs and expenses of preserving the estate subsequent to the filing of the petition, including as an expense of administration one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases. Under the plain terms of the statute only one attorney's fee may be allowed as compensation for services rendered to the bankrupt. And it is to compensate for professional services rendered in connection with the preservation of the estate. The granting or denial of a discharge is personal to the bankrupt. It has nothing to do with the preservation of the estate. And therefore professional services of an attorney in representing the bankrupt in resisting objections to the granting of a discharge are not services which are compensable out of the bankrupt estate. In re Rothman, 85 F. (2d) 51." (Opinion, p. 3, our underscoring).

That part of 11 U.S. Code 104 (a) (1) which is here pertinent is as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administra-

fee, including the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of Title 18, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; . . ." (Our underscoring)

Consideration of the content, order and punctuation of the foregoing provision shows clearly that the item, "costs and expenses of preserving the estate" does not include the "one reasonable attorney's fee" mentioned in the later separate clause of the statute. The text of the act clearly shows that attorneys' fees are not a part of the costs and expenses of preserving the estate.

Attorneys' fees never have been allowed as a part of the "costs and expenses of preserving the estate". This clause includes expense items such as rent, storage, insurance, services of watchmen, wages and salaries of employees, repairs, upkeep, etc., paid subsequently to the date of the filing of the petition and prior to the date of the appointment of the trustee.

> *Collier on Bankruptcy*, 14th Ed., Vol. 3, Sec. 64.102, p. 2070; see also Sec. 62.13, pp. 1510 - 1537.

In the past attorneys' fees have been allowed only as a part of the costs and expenses of administration.

> *Collier on Bankruptcy*, 14th Ed., Vol. 3, Sec. 64.105, p. 2091, 2093; see also Sec. 62.31, p. 1596.

The punctuation adopted in the present act indicates, however, that attorneys' fees may no longer be allowable even

as a part of the costs and expenses of administration, but rather as a separate, independent item.

When the Court of Appeals says that the claim of the attorneys for the bankrupt for services rendered in connection with objections to a discharge is not allowable because the services "had nothing to do with the preservation of the estate", it has set up a test of compensability which is contrary to the wording of the statute itself, and which conflicts with the test laid down by this court in the *Conrad*, *Rubin and Lesser* case.

4. *The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals in the same matter.*

In the case of

In re Rothman, 85 F. 2d 51 (CCA 2, 1936),

above referred to, the United States Circuit Court of Appeals for the Second Circuit denied a claim made by the bankrupt's attorney for compensation for services rendered to the bankrupt on objections to discharge. The court held that the services which were allowable under Section 64 (b) (3) of the Bankruptcy Act of 1898, as then amended, now superseded by 11 U.S. Code 104 (a) (1),

> "... are those rendered in and of the administration of the estate";

and that

> "Compensable services may also include those which are reasonably necessary to enable the bankrupt to perform his duties under the act."

The *Rothman* case held that under the act as it then existed services rendered by a bankrupt's attorney on objections to discharge did not meet these tests of compensability. But the act has been changed. Under the act as it exists today such services *are* "rendered in and of the administration of the estate" and are "reasonably necessary to enable the bankrupt to perform his duties under the act"; and so,

under the heretofore *Bethmont* case itself, the services are compensable.

In the present case the Court of Appeals denied compensation on the ground that

> "The granting or denial of a discharge is personal to the bankrupt. It has nothing to do with the preservation of the estate." (Opinion, p. 8; our underscoring)

This test of compensability conflicts with the test which was applied in the *Bethmont* case.

Other miscellaneous considerations indicate that a review by this court is desirable.

The question presented can never be presented more clearly and distinctly than in the present case. The case is unique in that it presents a single issue and in that the amounts involved justify an attempt to obtain a clarification of the law.

In the present case the creditors who oppose the discharge have been fully reimbursed from the estate for ample fees paid to their attorneys for opposing the discharge (R. 6, 10). In respect to compensation all attorneys in the proceeding who have rendered the same kind of services should be placed on an equal footing.

CONCLUSION.

For the reasons stated petitioners urge the court to issue the writ.

Respectfully submitted,

Bentley M. McMullen,
200 Dayton Street,
Denver 8 (Aurora), Colorado,
Attorney for Petitioners.

January 24, 1962.

APPENDIX A

Appeal from the District Court of the United States for the District of Colorado.

PAGE 1

Bentley M. McMullin for Appellants.
John W. Low for Appellee.

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under name and style of LEWIS and MURRAY; and BENTLEY M. McMULLIN,

Appellants,

THOMAS J. FITZGERALD, Trustee in Bankruptcy,

Appellee.

(October 21, 1961.)

PAGE 2

The appeal in this voluntary proceeding in bankruptcy presents for determination the question whether attorneys for the bankrupt are entitled to compensation out of the bankrupt estate for services rendered to the bankrupt in resisting objections to the granting of a discharge. The trial court decided the question in the negative.

Historically, one of the basic purposes of the bankruptcy law is to bring about a ratable distribution of the property of the bankrupt among his creditors holding just demands; to protect the creditors from one another; and to release the honest bankrupt from further obligation to such creditors. May v. Fidelity and Deposit Company of Maryland, 292 F. (2d) 259. In harmony with that cardinal purpose, section 64(a) of the Bankruptcy Act, as amended, 11 U.S.C.A. 104(a), fixes the priority of debts and authori-

PAGE 3

zes their payment out of the bankrupt estate before payment of dividends to creditors. The statute expressly

authorizes payment of actual and necessary costs and expenses of preserving the estate subsequent to the filing of the petition, including as an expense of administration one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases. Under the plain terms of the statute only one attorney's fee may be allowed as compensation for services rendered to the bankrupt. And it is to compensate for professional services rendered in connection with the preservation of the estate. The granting or denial of a discharge is personal to the bankrupt. It has nothing to do with the preservation of the estate. And therefore professional services of an attorney in representing the bankrupt in resisting objections to the granting of a discharge are not services which are compensable out of the bankrupt estate. In Re Rothman, 85 F (2d) 51.

Appellants seek to distinguish the Rothman case from this one on two grounds. One is a difference between the

statute then in effect relating to the payment of attorney's fee, and the statute now in effect. While there are some textual differences between the language contained in the statute, then and now, both contemplate limiting attorney's fees for representing a bankrupt to services rendered in furthering the preservation of the bankrupt estate. The other attempted distinction is that under the statute as it existed at the time the Rothman case was decided the discharge proceeding constituted a collateral issue between the bankrupt and his creditors while under the present statute no collateral issue is presented in a discharge proceeding. The court in the Rothman case did state that the discharge proceeding remained a collateral issue, personal between the bankrupt and the creditors. Whether a contest between the bankrupt and his creditors relating to the granting or denial of a discharge be denominated or treated as presenting a collateral issue, as constituting a collateral proceed

ing, or otherwise, such proceeding is unrelated to the preservation of the bankrupt estate and therefore professional services rendered to the bankrupt in resisting objections to the granting of a discharge are not compensable services within the intent and meaning of section 64(a), supra.

PAGE 5

In addition to seeking compensation for professional services rendered to the bankrupt in resisting objections to the granting of the discharge, the attorneys sought reimbursement out of the bankrupt estate for $45.00 which they advanced for the bankrupt as docket fee. Section 64(a), supra, expressly authorizes payment out of the bankrupt estate of filing fees paid by persons other than the bankrupt in a voluntary case. Since the attorneys advanced for the bankrupt the filing fee, they are entitled to be reimbursed therefor out of the estate.

The attorneys also seek reimbursement in the sum of $51.15 for sums paid for recorders fee and for transcripts of proceedings. We fail to find any statutory authority for reimbursement of such expenditures.

The order denying the petition of the bankrupt and the attorneys is modified to the extent of allowing reimbursement for $45.00 advanced in payment of the filing fee; and as modified, the order is

AFFIRMED.

APPENDIX B

11 U. S. Code 104 Debts which have priority.

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expenses of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow: *Provided, however*, That where an order is entered in a proceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy

proceeding, if any; (2) wages and commissions not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and, for the purpose of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under chapter 9 of Title 18, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law; *Provided, however*, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

(b) Repealed.

Office-Supreme Court, U.S.
FILED
APR 20 1962
JOHN F. DAVIS, CLERK

No. 689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,
Petitioners,

vs.

THOMAS J. FITZGERALD, Trustee in Bankruptcy,
Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY,
a partnership consisting of HORACE LEON MIDYETT and RUEL FARRIES MAY, Bankrupt.

PETITION FOR REHEARING
of
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BENTLEY M. McMULLIN,
200 Dayton Street,
Denver 9, Colorado,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 689

JOSEPH P. LEWIS and WILLIAM C. MURRAY, JR., as partners under the name and style of LEWIS and MURRAY, and BENTLEY M. McMULLIN,

Petitioners,

vs.

THOMAS J. FITZGERALD, Trustee in Bankruptcy,

Respondent.

IN THE MATTER OF
MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership consisting of HORACE LEON MIDYETT and RUEL FARRIES MAY, Bankrupt.

PETITION FOR REHEARING of PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that this court may grant a rehearing of their petition for a writ of certiorari, and as grounds therefor respectfully show unto the court as follows:

Since the passage of the Chandler Act (Act of June 22, 1938; 52 Stat. 840), Section 14 of the Bankruptcy Act, as amended, now appearing as 11 U. S. Code 32, has provided that

> "The adjudication of any person, except a corporation, shall operate as an application for a discharge: Provided, That the bankrupt may, before the

hearing on such application, waive by writing, filed with the court, his right to a discharge . . .

"After the filing fees required to be paid by this Act have been paid in full the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge . . . Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed . . ."

Section 7 of the Bankruptcy Act, as so amended, now appearing as 11 U. S. Code 25, provides that

"The bankrupt shall (1) attend at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge, and at such other times as the court shall order . . ."

These sections have been previously quoted or referred to in our petition for a writ of certiorari, and are referred to in this petition only for the purpose of making the quoted parts readily available for consideration in connection with what follows.

What we failed to point out in our petition for a writ of certiorari but which, because of its importance, should have been pointed out, is twofold.

In the first place the effect of these statutory amendments upon the right of bankrupt's counsel to compensation for services rendered in connection with objections to discharge has never been the subject of judicial interpretation. So far as this question is concerned, the two sections referred to are new legislation still awaiting judicial construction.

In the second place, and this is the point on which we particularly rely, the effect of the new legislation is to compel the bankrupt to perform certain statutory duties in connection with his discharge in every case in which the discharge is not automatically granted. In every case in which the discharge is not automatic the bankrupt is

now required to perform acts in the performance of which he is entitled to the services of an attorney.

If the bankrupt does not waive his right to a discharge, and if no objections to a discharge are filed, the discharge is granted automatically and the bankrupt is neither required nor permitted to do anything whatever in connection with the matter.

If the bankrupt desires to waive his right to a discharge, he can do so, but only by means of a writing filed with the court. In determining whether he should waive his right, and in preparing and filing the necessary writing, the bankrupt is entitled to the advice and assistance of counsel.

If the bankrupt does not waive his right to a discharge, and if objections to his discharge are filed, he is required by the statute to attend the hearing upon the objections, and in so doing is entitled to the advice and assistance of counsel.

Under today's legislation the bankrupt is compelled to accept a discharge unless he waives that right, in which case he is compelled to take specific affirmative action, or unless objections are filed, in which case he is compelled to attend the hearing. Under no circumstances can the bankrupt escape being subject to one of these three compulsions.

There can no longer ever be a case, in which the discharge is not automatically granted, in which the bankrupt is not required to perform some statutory duty. Always, under today's legislation, when the discharge is not automatic the bankrupt is entitled to the advice and assistance of counsel to aid him in the performance of these statutory duties.

And since, under the decisions of this Court and of the Circuit Court of Appeals for the Second Circuit which are cited in our petition for a writ of certiorari (pp. 9, 12), the attorney for the bankrupt is entitled to compensation for services rendered by him in aiding the bankrupt to

perform the duties imposed upon him by the act, there can no longer ever be a case in which the attorney for the bankrupt is not entitled to compensation in some amount for services properly rendered by him in connection with the bankrupt's discharge.

The amendment has created a new basis for the award of such compensation.

The situation thus presented is worthy of the attention of this court, for unless the decision of the United States Court of Appeals for the Tenth Circuit is corrected, virtually all individual bankrupts will hereafter be required to perform the duties imposed upon them by the provisions of the act relative to their discharges, without the advice or assistance of counsel. It is only under the most unusual circumstances that a bankrupt, who has within the preceding two months or so divested himself of all his property, can find the means to employ counsel at his own expense. If the decision of the Court of Appeals is not reversed, all, or nearly all individual bankrupts will hereafter be deprived of a substantial right bestowed upon them by the bankruptcy act itself.

Respectfully submitted,

BENTLEY M. McMULLIN,
200 Dayton St.,
Denver 9, Aurora, Colorado
Attorney for Petitioners

April 19, 1962.

CERTIFICATE OF COUNSEL

I do hereby certify that this petition for a rehearing of petitioners' petition for a writ of certiorari is filed in good faith and not for purposes of delay, and that the matters upon which this petition is based are substantial grounds available to petitioners and not previously presented.

BENTLEY M. McMULLIN